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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1731

DAVID DAVIDSON AND THE DAVIDSON TRANSFER AND STORAGE COMPANY,

Petitioners,

v.

ALENETTA MILLER, INFANT BY MILDRED LEGGETT, MOTHER AND NEXT FRIEND AND MILDRED LEGGETT, INDIVIDUALLY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BALTIMORE CITY

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CONSTITUTIONAL PROVISIONS INVOLVED

Section 1257 of the United States Code provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of

its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States. June 25, 1948, c. 646, 62 Stat. 929.

For the purpose of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

As amended July 29, 1970. Pub. L. 01-358. Title 1, 172 (e) (1). 84 Stat. 590.

STATEMENT OF THE CASE

A Declaration and Election for Jury Trial was filed in the Superior Court of Baltimore City in December, 1972 on behalf of Alenetta Miller, Infant, by Mildred Leggett, mother and next friend, and Mildred Leggett, individually, against David Davidson and D. L. Peterson Trust, alleging serious, painful and permanent injuries to the infant plaintiff by reason of the negligent operation of an automobile owned by D. L. Peterson Trust and operated by David Davidson on December 2, 1971. An Amended Declaration and Election for Jury Trial was filed in the same Court on January 19, 1974, essentially striking the D. L. Peterson Trust as a Co-Defendant and joining in, in its stead, Davidson Transfer and Storage Company. The new Co-Defendant was served with process on January 24, 1974. On February 19, 1974, a General

Issue Plea to the Amended Declaration and Election for Jury Trial was filed on behalf of the Davidson Transfer and Storage Company, along with a Suggestion of Removal (A. 1). An informal conference was held in the chambers of Chief Judge Dulany Foster on the same day and immediately following a discussion concerning the basis of the Suggestion, Judge Foster removed the case from the Superior Court of Baltimore City to the Baltimore City Court (A. 4). In addition, Judge Foster assigned this matter for trial by Jury on April 1, 1974. Thereafter, on March 14, 1974, the Appellants herein entered an Appeal to the Court of Special Appeals of Maryland from the order of Judge Foster denying the Appellants a removal to a Court outside the Eighth Circuit (A. 4). The appeal was dismissed and a Petition for Writ of Certiorari was denied by the Court of Appeals of Maryland. The trial was postponed and rescheduled for April 22, 1974 due to the sickness of Petitioner's counsel. This case proceeded to trial on April 22, 1974 and a Motion for a new trial is pending.

ARGUMENT

I.

THE ORDER OF THE SUPERIOR COURT OF BALTIMORE CITY REMOVING THE CASE TO THE BALTIMORE CITY COURT IS NOT A FINAL JUDGMENT WITHIN THE MEANING OF UNITED STATES CODE, TITLE 28, SECTION 1257.

The action of a State court will not be considered final for the purpose of federal review where it is of merely interlocutory or intermediate character or where it is subject to further review or correction by a State court.[1] *Market St.*

[1] Although as a general rule the finality of a state court judgment is not controlled by the designation given to it by a State, *Market St. R.Y., supra; Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 72 (1946), a Federal Court can resort to local law to determine what affect the judgment has under state rules of practice. *Richfield Oil Corp., supra.*

R.Y. v. R.R. Commission of California, 324 U.S. 548, 551 (1945).

It has been held in Maryland that the selection of a place for a trial is within a trial court's discretion and not a final action. *Lee v. State*, 161 Md. 430, 432, 157 A. 723 (1931); *Middleton v. Morgan*, 263 Md. 154, 158, 282 A.2d 94, 97 (1971). The order by Judge Foster of the Superior Court of Baltimore City removing the case from Superior Court of Baltimore City to the Baltimore City Court (A. 1) was an exercise of that trial judge's discretion and thus interlocutory in nature and not subject to an immediate appeal. The Petitioners, herein, suggested a removal to a Court outside the Eighth Circuit, which is Baltimore City, because the Plaintiff is a small child and a resident of Baltimore City and the Defendant a large Baltimore Corporation well known to residents of Baltimore City and possessed of extensive assets. They further alleged that sympathy for the Plaintiff and prejudice against the Defendant are inevitable in the locality of Baltimore City, but urged that there was no necessity for them to show actual prejudice (A. 1). Judge Foster, acting upon that which was before him, exercised his discretion and moved the case from the Superior Court of Baltimore City to the Baltimore City Court (A. 4).

The Petitioner's appeal to the Court of Special Appeals of Maryland (A. 4) was dismissed (A. 9), the court citing in its dismissal order *Middleton v. Morgan, supra*, where it was held that said exercise of discretion is interlocutory and that an immediate appeal therefrom is premature. Thereafter the Court of Appeals of Maryland denied the Petition for Writ of Certiorari and left the order of the Court of Special Appeals standing.

Since the Petitioner's appeal was taken on the ground of equal protection and *Middleton* concerns removal, it is

obvious that the Court of Special Appeals, in this case, felt that a review of the equal protection issue at that juncture was premature. *Middleton, supra,* makes it clear that dismissal of an appeal on the ground that it is premature does not affect the right of the appellant to seek review of actual prejudice after final judgment. It is established in Maryland that where a constitutional right is involved, action of a lower court rightfully exercising its discretion as to the functioning of that right will not be reviewed until there has been a final judgment. *Perlman v. State,* 226 Md. 67, 71, 172 A.2d 395, 397 (1961).

To grant jurisdiction under U.S.C. Title 28, Section 1257 would be to defeat the purpose of that Provision:

> "Since its establishment, it has been a marked characteristic of the Federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance . . . This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for Federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this court is invoked to upset the decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation only after 'the highest court of a State in which a decision in the suit could be had' has rendered a final judgment or decree. § 237 of the Judicial Code, 28 U.S.C., § 344 (a) [Now 28 U.S.C., § 1257]. This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of the Federal System." *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 123-124 (1945).

> "Congress has limited our power to review judgments from State courts lest the Courts jurisdiction be exercised in piecemeal proceedings to render advisory opinions. Were our reviewing power not limited to 'final' judgments, litigants would be free to come here and seek a decision on Federal questions, after later proceedings might subsequently prove to be unnecessary and irrelevant to a complete disposition of the litigation." *Pope v. Atlantic Coast Line, R.R. Co.*, 345 U.S. 379, 381, 382 (1953).

This case was tried on April 22, 1974 and Petitioner's motion for a new trial is pending. To grant the Petition for Certiorari will result in a stay of all further Maryland proceedings and a consequent prolongation of litigation.

Although 28 U.S.C., § 1257 has been construed to allow review in matters wholly separate and independent to the merits of the case, this is only a small class of exceptions as explained in *Local 438, Construction v. Curry*, 371 U.S. 542, 549 (1963). It is a:

> "Class which finally determine claims of right separable from the collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

The *Curry* line of cases is distinguishable and they should be limited on their facts. In *Curry*, a State court asserted jurisdiction over a case where the State court has no authority. In the case at bar it is undisputed that the Maryland courts have jurisdiction in the case. The court in *Curry* was concerned with the fact that the Petitioner, therein, should not be forced to litigate before a state court and then be compelled to relitigate before a Federal agency. In the case at bar, the Petitioner will have to litigate in Maryland

no matter what the outcome of the constitutional question is. In *Curry*, the Court was also concerned with the risk that national labor policy would be eroded if jurisdiction were not granted. There are no counter policy considerations in the case at bar. Only the policy behind 28 U.S.C., § 1257 stands to be frustrated. *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555 (1963), a case which follows *Curry* is also distinguishable. The dispute in *Langdeau, supra*, focused on whether a State statute or a federal statute was controlling. In the case at bar, there is no such dispute.

II.

THE ORDER OF THE SUPERIOR COURT OF BALTIMORE CITY DENYING TO PETITIONERS A REMOVAL OUTSIDE THE CITY OF BALTIMORE DID NOT DENY TO PETITIONER THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Maryland Constitution, article IV, § 8, provides:

> "[I]n all suits or actions at law . . . pending in any of the courts of law in this State having jurisdiction thereof upon suggestion in writing under oath of either of the parties to said proceedings that such party cannot have a fair and impartial trial in the court in which same may be pending, the court shall order and direct the record of the proceedings in such suit or action . . . to be transmitted to some other court having jurisdiction in such case for trial . . ."

The decisions of the Court of Appeals of Maryland have held that the right created by the Maryland Constitution, without proof of actual prejudice, is an absolute right of removal to a different *court*, but it is not a right of removal to a different *circuit*. *Weiskittle v. State, Use of Samuel*, 58 Md. 155, 156-157 (1882); *Middleton v. Morgan*, 263 Md. 154, 282 A.2d 94, 96 (1971).

As construed by the Court of Appeals of Maryland, the operation of the Maryland Constitution, article IV, § 8 is as follows:

First, where removal is sought from a court in one judicial circuit to a court in another judicial circuit, there is no absolute right of removal.

> "It rests in the discretion of the court, from which the removal is sought, to send the case to some other court having jurisdiction, either within or without the circuit as it may think best." *Weiskittle, supra; Middleton, supra.*

To the extent any litigant in any of Maryland's eight judicial circuits desires to have his case removed to another *circuit*, he has no absolute right of removal. In this regard, all litigants in the state are treated the same. For example, if a litigant in Baltimore County finds that his case will be prejudiced in the Third Judicial Circuit he has no absolute right of removal to another circuit; he must show actual prejudice. Similarly, if a litigant in Baltimore City desires to have his cause removed to another circuit he has no absolute right. Since all litigants are treated the same upon a request for a removal to another circuit, there is no denial of equal protection.

Second, where removal is sought from one court in a judicial circuit to a second court in the same judicial circuit, there is an absolute right of removal without proof of actual prejudice. *Smith v. Fredericktown Bank and Trust Company*, 258 Md. 141, 265 A.2d 236 (1970). Petitioners assert that in application this means that litigants in any of the judicial circuits throughout the State except Baltimore, which is a judicial circuit unto itself, enjoy an absolute right to have their case transferred to a court in another *locality*. Baltimore City litigants, on the other hand, do not have the

right to have the cause removed to another *locality*, they only have the absolute right to have the cause removed to another court in the same courthouse.

Assuming for the purpose of argument, that there is some difference between the treatment of litigants in Baltimore City and litigants in other judicial circuits, such difference in treatment does not mean that there is a denial of equal protection. As recently as 1973 the Supreme Court has said:

> "[T]his court has never questioned the State's power to draw reasonable distinctions between political subdivisions within its borders." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 n. 66 (1973).

This rule has enjoyed a long history. In *Missouri v. Lewis*, 101 U.S. 22 (1879), the Supreme Court held:

> "Each state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another for another portion." Id. at 30.

The Courts reasoning is significant:

> "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of the line there may be a right to trial by jury, on the other side, of the line, no such right . . . If diversities of the laws and of judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State." Id. at 31.

The *Lewis* case was followed in *Mallett v. North Carolina*, 181 U.S. 589, 598 (1901), and *Chappell Chemical and Ferti-*

lizer Company v. Sulphur Mines of Virginia, 172 U.S. 474 (1899). (This was a Maryland case where the procedure for electing jury trial in Baltimore City was at variance with the rest of the State.) The *Lewis, supra* case, was also applied in *Salsburg v. Maryland*, 346 U.S. 545 (1954).

The Constitution in enjoining the laws upon states precludes *irrational* discrimination as between persons or groups of persons. But the Constitution does not require situations "which are different in fact or opinion to be treated in law as though they were the same." *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948). In determining whether there has been an irrational discrimination, it has been said that there is a presumption of reasonableness with the state.[2] *Salsburg v. Maryland*, 346 U.S. 545, 553 (1954).

> " 'A statutory discrimination will not be set aside as a denial of the equal protection of the laws if any state of facts may reasonably be conceived to justify it.' *Metropolitan Casualty Insurance Co. v. Brownell*, 294 U.S. 580, 584 (1934)." *Salsburg, supra* at n. 9.

There are reasons the legislature could have relied upon to justify its decision in denying to Baltimore City litigants the absolute right to have a case removed to another location: When Maryland provided for eight judicial circuits a reasonable assumption is that its decision was affected by considerations of population and the workload of the courts in each circuit. In some circuits four counties were combined and in other circuits only two counties were combined. Baltimore City was made a circuit unto itself because it had a greater population density. Three circuit courts were lo-

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[2] See also *Atchison T. & S.F. R.R. Co. v. Mathews*, 174 U.S. 96, 104 (1899), and *Lindsey v. Normet*, 405 U.S. 56, 71 (1972) ("The state is presumed to have acted within its constitutional power despite the fact that in practice [its] laws result in some inequality. *McGowan v. Maryland*, 366 U.S. at 425-426, 81 S. Ct. at 1105.").

cated in the one Baltimore City courthouse as a matter of convenience to the more densely populated circuit for which it served. Alternatively three separate courts could have been placed in different localities in the city but because of the concentration of population, it may have been felt to be more expedient for there to be one central location of justice.

> "Where part of a state is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions — trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the state government if it could not in its discretion, provide for those various exigencies." *Missouri v. Lewis*, 101 U.S. 22, 32 (1879).

It has been suggested that under usual circumstances and for most purposes the legislature may in the exercise of the various powers of state sovereignty employ population as a basis for classification, making distinctions applicable to people of different localities without violating equal protection. *Packard v. Banton*, 264 U.S. 140, 143-144 (1924) (by implication). Alternatively, the legislature may have felt the greater amount of population and the volume of litigation in Baltimore City precluded allowance for an absolute right of removal because the volume of litigation that would be removed would place too great a burden on the county courts. In addition, the legislature obviously felt that in a large city such as Baltimore, it was unlikely that twelve unbiased jurors could not be found. Hence, the legislature chose to leave it to the trial courts discretion as to whether a case is removed outside Baltimore City; said discretion being subject to appellate review. *Middleton v. Morgan*, 263 Md. 154, 159, 282 A.2d 94, 97 (1971).

States are not prevented by the Equal Protection Clause from confining "its restrictions to those classes of cases where the need is deemed the clearest." *Miller v. Wilson*, 236 U.S. 373, 384 (1915); *Skinner v. Oklahoma*, 316 U.S. 535, 540 (1942).

> "If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." *Miller v. Wilson, supra.*

Although the "evil to which the right of removal is addressed is the undue influence of local passion, prejudice, or interest to which juries are particularly subject", *Greenberg v. Dunn*, 245 Md. 651, 656, 227 A.2d 242, 245 (1966), Maryland has found through experience that this end is not best served by allowing the absolute right of removal to a different circuit. A counter consideration to allowing the absolute right was expressed in *Smith v. Fredericktown Bank*, 258 Md. 141, 143, 265 A.2d 236, 238 (1970):

> "With the noticeable increase in litigation in Maryland, since 1875, when the right of removal was last placed in the Constitution, it has become common practice for attorneys to use the suggestion of removal as an unimpeachable and uncontrollable dilatory tactic. While it is still correctly used to avoid the possible impact of local prejudice in those cases in which it can be exercised . . . its use as an eleventh hour maneuver to avoid trial both harasses the opposition and disrupts the constitutional rights of others to have their day in court."

The risk that an absolute right of removal could be used as a dilatory tactic, plus the likelihood that in a large population center such as Baltimore, twelve unbiased jurors can be found, may have led the legislators to conclude that the evil was not the clearest evil in Baltimore city. Hence only discretionary removal was allowed from Baltimore City. Where a trial judge is shown proof of actual prejudice, it is

within his discretion to remove the case outside of the city and into another circuit. *Weiskittle v. State, Use of Samuel*, 58 Md. 155 (1882); *Middleton v. Morgan*, 263 Md. 154, 282 A.2d 94 (1971). In fact, where a trial judge fails to remove a case to another circuit, he can be reversed for an abuse of discretion. *Middleton, supra; Weiskittle supra; Lee v. State*, 161 Md. 430, 157 A. 723 (1931).

The distinction made in the removal provision of the Constitution is justified based on Maryland's experience with removal. It has been held that States may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by *experience*. *Bryant v. Zimmerman*, 278 U.S. 63 (1928); *Skinner v. Oklahoma*, 316 U.S. 535, 540 (1942). See also *Miller v. Wilson*, 236 U.S. 373 (1915). The Constitution of 1867 gave the party seeking the removal of his case the unrestricted right to determine that it should go to a different circuit. Under the Constitution of 1867 Baltimore city litigants did enjoy the absolute right to remove to another circuit and hence to a location outside the city. "After an experience of seven years it was found that the Constitution of 1867, art. IV § 8 (the section that relates to removals) did not work well in practice, and it was amended by the Act of 1874, ch. 364 . . ." *Weiskittle v. State*, 58 Md. 155, 156 (1882); *Middleton v. Morgan*, 263 Md. 154, 157, 282 A.2d 94, 96 (1971).

It has been said that in determining the reach and scope of particular legislation states need not provide "abstract symmetry." *Patsone v. Pennsylvania*, 232 U.S. 138, 144 (1914); *Skinner v. Oklahoma, supra*. In the case at bar Maryland has attempted to establish the rule that there is no absolute removal outside the circuit. To ask that this rule be abrogated so that Baltimorians will have the right to remove to another locality is to ask for abstract symmetry, incompatible with the principle that the machinery of government

would not work if it were not allowed a little play in its joints. *Skinner v. Oklahoma, supra; Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931).

CONCLUSION

For the reasons set forth above the Petition for Certiorari should be denied.

Respectfully submitted,

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